

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

ROY TILLMAN,

Defendant-Appellant.

UNPUBLISHED
December 7, 2004

No. 249414
Saginaw Circuit Court
LC No. 03-022659-FH

Before: Markey, P.J., and Fitzgerald and Owens, JJ.

PER CURIAM.

Defendant was convicted by a jury of first-degree retail fraud, MCL 750.356c. He was sentenced as an habitual offender, fourth offense, MCL 769.12, to a prison term of forty-six to 180 months. Defendant appeals as of right. We affirm. This case is being decided without oral argument under MCR 7.214(E).

Defendant argues that he was denied effective assistance of counsel by trial counsel's failure to move to strike Brandon Beaudoin's testimony identifying defendant as being at the scene of the alleged crime because an unconstitutional identification procedure occurred when, according to Beaudoin's trial testimony, police detectives showed him a picture of defendant a week prior to trial. We disagree.

To establish a claim of ineffective assistance of counsel, a defendant must show (1) that trial counsel's performance fell below an objective standard of reasonableness and (2) that this prejudiced the defendant to the extent of denying him a fair trial in that there is a reasonable probability that, but for counsel's error, the result of the proceedings would have been different. *People v Moorner*, 262 Mich App 64, 75-76; 683 NW2d 736 (2004).

Assuming for purposes of discussion that trial counsel fell below an objective standard of reasonableness in failing to object to the identification testimony in question, we nevertheless conclude that defendant has not established an ineffective assistance of counsel claim. Even if that identification testimony had been stricken, the remaining proofs constituted such overwhelming evidence of defendant's guilt that there is no reasonable probability that the outcome of the proceedings would have been different. David Washington's testimony indicated

that defendant had possession of a two-door Buick owned by his girlfriend Emmogene Moore on the relevant day. Detective Thomas Luth's testimony indicated that the license plate number of the Buick observed by Beaudoin¹ at the time of the incident was registered to Moore. The testimony of Detectives Luth and Brian Pitt reflected that defendant effectively confessed to stealing four winter coats from the Sears store and then selling them "on the street."

In light of the overwhelming evidence of guilt independent of the challenged identification testimony from Beaudoin, we conclude that defendant has not established an ineffective assistance of counsel claim because there is no reasonable probability that the outcome of the trial would have been different absent that identification testimony.

Affirmed.

/s/ Jane E. Markey
/s/ E. Thomas Fitzgerald
/s/ Donald S. Owens

¹ Defendant's argument presents no reason for disregarding any aspect of Beaudoin's testimony or observations other than his identification of defendant. Thus, there is no reason to disregard the evidence regarding Beaudoin writing down the license plate number he saw on the Buick.